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No. 206

SUPREME COURT, U.S.
FILED
JAMES H. BROWNING, Clerk

Supreme Court of the United States

October Term, 1960

[illegible] Maxwell Hope Dawson,

Petitioner,

against

SS Mormacsun, her engines, boilers, etc., and Moore-McCormack Lines, Inc.,

Respondents.

H. L. McKinnon Co., Ltd.,

Petitioner,

against

SS Mormacsun, her engines, boilers, etc., and Moore-McCormack Lines, Inc.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Supreme Court of the United States

OCTOBER TERM, 1960

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Petitioner,

—against—

SS MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondents.

H. L. McKINNON CO., LTD.,

Petitioner,

—against—

SS MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners seek a Writ of Certiorari to review a judgment of the Court of Appeals for the Second Circuit, and, in support of their petition, show:

Opinions Below and Jurisdiction

The opinion of the Court of Appeals is reported at 276 F. 2d 722 and is set forth in the Appendix to this petition. The opinion of the District Court is not officially reported. However, it is reported unofficially in 1959 American Maritime Cases 1842. The opinion of the District Court appears on pages 289a-296a of the Appendix to Appellants' Brief filed with this petition.

The Court of Appeals rendered its judgment on April 6, 1960, and judgment was entered that day. A petition for rehearing was denied on May 11, 1960.

This Court has jurisdiction under Title 28, U. S. Code, Sec. 1254.

Question Presented

Where respondent-owner of an American ocean common carrier agreed to carry two shipments of coffee, one from Paranagua, Brazil, the other from Santos, Brazil, to Montreal, stowed in a compartment, the floor of which formed the top of four of the ship's deep ballast tanks, including No. 2 port deep tank, under bills of lading incorporating the U. S. Carriage of Goods by Sea Act (46 U. S. C. A. sections 1300, et seq.), and arranged stops at intermediate ports, namely, Baltimore, Philadelphia, Brooklyn, and Boston, for the purpose of discharging cargo, and, at Brooklyn, her Home Port, for other purposes, namely, for (1) annual Coast Guard inspection; (2) substantial repairs under the supervision of the Home Office representatives; (3) the cleaning of No. 2 port deep tank by shore agents; (4) paying off the crew which had signed Foreign Articles; (5) signing on a new crew under Canadian Coastwise Arti-

cles; and (6) for bunkers, such voyage being, in legal contemplation, a voyage in stages; and,

Where, in order to protect a dry cargo of wool, stowed in said No. 2 port deep tank at Buenos Aires, against damage by sea water, the wool being consigned to Philadelphia, an intermediate port, the six inch diameter overflow pipe, and the two inch diameter vent pipe, both pipes running from inside the tank to the weather deck, had been plugged and capped inside the tank, and had not been removed at Brooklyn, or at Boston, notwithstanding the fact that it was contemplated prior to the departure of the vessel from Brooklyn that said tank would be required for sea water ballast purposes at Boston, prior to the arrival at Montreal, and notwithstanding the tank, in fact, was used at Boston for ballast purposes, without first removing the plugs, thereby permitting pressure within the tank, which caused the tank cover to become unseated, and the tank to overflow, and to flood the compartment directly above the tank, resulting in the damage to petitioner's coffee stowed in said compartment:

1. Is respondent carrier free from liability with respect to cargo damage, in virtue of Title 46 U. S. Code, Section 1304, which, *inter alia*, relieves the water carrier from responsibility for loss or damage resulting from errors in management of the ship? or,

2. The shipowner, having arranged to perform the voyage in stages, does Section 1303(1) of said Act, which, *inter alia*, binds the carrier "before and at the beginning of the voyage, to exercise due diligence to make the ship seaworthy," apply before and at the beginning of that stage of the voyage at and from Brooklyn to Montreal via Boston; and furthermore, should said Section 1303(1) be construed as paramount to and overriding Section 1304 unless the water

carrier first satisfies the provisions and conditions of Section 1303(1)?

Statute Involved

The following sections, pertinent to this petition, are taken from the Carriage of Goods by Sea Act, Title 46, U. S. Code, Sections 1300, et seq.:

RESPONSIBILITIES AND LIABILITIES

Seaworthiness

Sec. 1303(1) The carrier shall be bound, before and at the beginning of the voyage, to exercise due diligence to—

(a) Make the ship seaworthy;

(b) Properly man, equip, and supply the ship;

(c) Make the holds, refrigerating and cooling chambers, and all other parts of the ship in which goods are carried, fit and safe for their reception, carriage, and preservation.

Cargo

(2) The carrier shall properly and carefully load, handle, stow, carry, keep, care for, and discharge the goods carried.

* * * * *

RIGHTS AND IMMUNITIES

Unseaworthiness

Sec. 1304(1) Neither the carrier nor the ship shall be liable for loss or damage arising or resulting from unseaworthiness unless caused by want of due diligence

on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped, and supplied, and to make the holds, refrigerating and cool chambers, and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title. Whenever loss or damage has resulted from unseaworthiness, the burden of proving the exercise of due diligence shall be on the carrier or other persons claiming exemption under this section.

Uncontrollable Causes of Loss

(2) Neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from—

(a) Act, neglect, or default of the master, mariner, pilot, or the servants of the carrier in the navigation or in the management of the ship;

(b) Fire, unless caused by the actual fault or privity of the carrier;

(*c* to p) * * *

(q) Any other cause arising without the actual fault and privity of the carrier and without the fault or neglect of the agents or servants of the carrier, but the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage.

* * * * *

Statement of the Case

At Buenos Aires, prior to loading the involved shipments of coffee, the No. 2 port deep tank was dry. Then the tank was fitted by using sweat fences, and by plugging the six inch diameter overflow pipe and by capping the two inch vent pipe to receive a dry shipment of wool consigned to Philadelphia (Chief Officer DeMontier, pp. 117a, 118a, 121a, 135a).*

The primary purpose of plugging the overflow pipe and capping the vent pipe which ran from inside the tank to the weather deck, was to protect the wool shipment against sea water damage, which otherwise might enter the tank (DeMontier, pp. 119a, 137a).

After the discharge of the wool cargo at Philadelphia, the MORMACSURF proceeded to Brooklyn, where, among other things, the sweat fences were taken out by shore agents of respondents, and the tank cleaned, *but the plugs were not removed from the tank* (DeMontier, pp. 121a, 122a).

Neither respondents' Home Office representatives, nor respondents' shore agents, nor any of the ship's officers acting for respondents, removed the plug from the overflow pipe, or the cap from the vent pipe, prior to the vessel's departure from Brooklyn (DeMontier, p. 122a).

Admittedly, during the time the tank was dry at Brooklyn and cleaned, it would have been a simple matter to have removed the plug and cap (DeMontier, p. 155a).

On leaving Brooklyn, the tank was unfit to receive ballast, for the reason that with the overflow pipe plugged

* References are to pages of the Appendix to Appellants' Brief filed with this petition.

and the vent capped, internal pressure would build up during the process of ballasting the tank (Finch, p. 241a).

Admittedly, pressure within the tank could not build up unless the overflow and vent pipes were plugged (Finch, p. 241a).

It was anticipated at Brooklyn that No. 2 port deep tank would be used for ballast purposes prior to arrival at Montreal, and, in fact, the necessity for ballasting No. 2 tank for the voyage to Montreal arose at Boston (DeMontier, p. 154a; Captain Heitmann, pp. 100a, 101a).

The Chief Officer of the MORMACSURF admitted that the damage to the coffee occurred, *inter alia*, for the reason that he "left the plugs in" (p. 130a).

The Chief Officer told the Chief Engineer, who had charge of the fitness of the tank, that he was going to ballast, but the Chief Engineer advised against using this tank for ballasting purposes (DeMontier, p. 124a, Chief Engineer Taylor, pp. 188a, 201a; Exhibit 13, pp. 278a-281a).

The Chief Engineer testified that he "did not okay the tank to be filled at all. I did not give my permission, as I am supposed to do. I said as far as I was concerned, the tank was not inspected to be filled for ballast" (p. 201a).

Although it is common ground that Chief Officer DeMontier read the ullage tape as 29 feet, and entered such reading in his personal memorandum book, which indicated three feet of empty space in the tank, the District Court disregarded such evidence and found as a fact that the tank was full, and hence the figure 29 feet on the tape should have been read as 26 feet (DeMontier, p. 143a; Exhibit Y; Findings of Fact, p. 291a).

In holding the tank was full, and that the Chief Officer misread the ullage tape, the District Court failed to consider the testimony of respondents' expert witness that

pressure could not be built up within the tank unless the vents were closed, and further failed to find that it made relatively little difference whether the tank was full, or filled within three feet of full. In either case, pressure would build up within the tank if the vents were closed, and unseat the tank cover if pumping continued (Finch, p. 241a).

It is common ground that during the course of ballasting, pressure built up within the tank, causing the tank cover to become unseated, and permitting ballast water to overflow and flood the compartment above the tank, resulting in damage by this water to the coffee in an amount of upwards of $100,000.

The damage to the coffee occurred during the transfer of ballast water from No. 4 starboard deep tank to No. 2 port deep tank, using the powerful cargo pump, when pressure built up within the tank for the reason that the overflow and vent pipes were plugged.

The District Court and the Court of Appeals held that the cause of the damage to the coffee was the erroneous reading of the ullage tape, which led the Chief Officer to continue pumping ballast water with the powerful cargo pump, which pumping resulted in the build up of pressure within the tank, and that the misreading fell within the purview of "management of the vessel within the meaning of the Carriage of Goods by Sea Act," notwithstanding it is common ground that pressure within the tank would not have built up to the poundage necessary to unseat the tank cover, if the overflow and vent pipes had not been plugged and capped.

Although asserted as the chief grounds for reversal, the Court of Appeals failed to consider the questions (1) whether No. 2 port deep tank was unfit to receive ballast by reason of the presence of the plugs, and thereby violated

Section 1303(1) of the Act, or (2) whether use of the tank for ballast purposes without first removing the plugs was negligence with respect to the care and custody of the cargo and in violation of Section 1303(2) of said Act.

Reasons for Granting the Writ

The reasons for granting this petition, we submit, may be stated briefly, as follows:

This Honorable Court has not settled the question involved herein, of great importance to shippers of cargo in foreign trade, and shipowners, namely, whether Section 1303(1) of the Carriage of Goods by Sea Act is paramount to, and overrides Section 1304 of the Act.

In the interests of uniformity, involving as it does, a question of great interest to shippers and shipowners, particularly as, we submit, the Court of Appeals:

1. Gave respondents the benefit of Section 1304(2)(a) of the Act, irrespective of the provisions and conditions of Section 1303(1), which bound the shipowner "before and at the beginning of the voyage," to exercise due diligence to make the ship seaworthy, and to make all parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation; and

2. Failed to follow well reasoned and accepted decisions of United States courts holding that the obligation of the carrier with respect to due diligence is not limited to his personal diligence within the meaning of the Act but requires the exercise of due diligence by the agents and servants of the carrier in the use of the equipment of the vessel "before and at the beginning of the voyage"; and

3. Failed to apply, or to consider the decision of the Judicial Committee of the Privy Council* rendered subsequent to the decision of the District Court herein holding that Article III, Rule 1, of the Canadian Water Carriage of Goods Act (identical with the language of Section 1303(1) of the U. S. Carriage of Goods by Sea Act) is an obligation overriding Article IV of the Canadian Water Carriage of Goods Act (identical with the language of Section 1304 of the U. S. Carriage of Goods by Sea Act).

ARGUMENT

1.

As to Unseaworthiness versus Error in Management

Sec. 1303(1) v. 1304

The question raised by this petition is whether Section 1303(1) of the Carriage of Goods by Sea Act is paramount to, and overrides Section 1304 of the Act. Sections 1303 (1) and 1304 of the Act are printed on pages 4-5 herein.

Title 46 of the U. S. Code places Section 1303 under the caption RESPONSIBILITIES AND LIABILITIES OF CARRIER AND SHIP, and places Section 1304 under the caption RIGHTS AND IMMUNITIES OF CARRIER AND SHIP.

Section 1303, paragraph (1), and its subsections (a), (b) and (c), are placed under the subchapter caption SEAWORTHINESS. Section 1303, paragraph (2) is placed under the subcaption CARGO, being restricted only to the care and custody of the cargo.

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* *Marine Footwear Company Limited v. Canadian Government Merchant Marine Limited (The MAURIENNE)*, (1959) A.C. 589

Section 1304, paragraph (1) is placed under the caption UNSEAWORTHINESS. Section 1304, paragraph (2), subsections (a) to (q), inclusive, are placed under the subcaption UNCONTROLLABLE CAUSES OF LOSS.

Although Sections 1303 and 1304 each contain additional paragraphs placed under different subcaptions, in so far as this petition is concerned, paragraphs (1) and (2) of Section 1303, and paragraphs (1) and (2) of Section 1304, are the only relevant sections.

Section 1303(1), subsections (a), (b) and (c), relating to seaworthiness, and Section (2), relating to care and custody of cargo, and Section 1304(1), relating to unseaworthiness, and Section 1304(2), relating to uncontrollable causes of loss, are opposing, and yet correlated sections, and, we submit, should be read together, in order that each section might properly be construed and given its intended application.

Section 1303, paragraph (1), subsections (a), (b) and (c), bind the carrier to exercise due diligence "before and at the beginning of the voyage" to make the ship seaworthy; properly man, equip and supply the ship; and to make the holds and all other parts of the ship in which goods are carried fit and safe for their reception, carriage and preservation.

Section 1304(1) relieves the carrier from liability for losses arising from unseaworthiness,

> "*unless* caused by want of due diligence on the part of the carrier to make the ship seaworthy, and to secure that the ship is properly manned, equipped and supplied, and to make the holds * * * and all other parts of the ship in which goods are carried fit and safe for their reception, carriage, and preservation in accordance with the provisions of paragraph (1) of section 1303 of this title." (Emphasis supplied.)

Thus by the very language of Section 1303(1) the carrier is bound to perform certain obligations respecting seaworthiness. If he fails to do so, the carrier is deprived of his non-liability with respect to losses resulting from unseaworthiness, by language appearing in Section 1304(1).

Thus, we submit, it is clear by the very words of the Act that, with respect to losses resulting from unseaworthiness caused by want of due diligence on the part of the carrier to make the ship seaworthy, or caused by the improper manning or equipment of the vessel, or caused by the unfitness of other parts of the ship in which goods are carried, the carrier is liable to the cargo owner, and irrespective of the causes of loss listed under Section 1304 (2)(a) to (q).

For the reasons above stated, we submit, it is immaterial whether cargo losses are primarily caused by (a) mismanagement; (b) fire; (c) perils of the sea; or other causes of loss mentioned under paragraph (2) of Section 1304.

It is clear from the language of the Act (Section 1304 (2)(q)), and it has been held in several decisions of the lower courts, that where a loss results in part from negligent navigation, or mismanagement, combined with the failure of the carrier, including his agents and servants, to exercise due diligence at the beginning of the voyage, or at the beginning of any stage of the voyage, to make the ship seaworthy, the carrier is liable with respect to cargo damage.

Section 1304(2)(q) relieves the carrier from responsibility for losses arising without the actual fault of the carrier, or without fault on the part of his agents or servants, but provides and requires that:

> " * * * the burden of proof shall be on the person claiming the benefit of this exception to show that neither the actual fault or privity of the carrier nor the fault or neglect of the agents or servants of the carrier contributed to the loss or damage."

One of the first cases involving the interpretation of Section 1303(1), as opposed to and correlated with Section 1304(2)(a), is the case of *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp. (The Fred Sargent)*, 32 F. Supp. 520. The decision was by Judge Tuttle, of the Eastern District of Michigan, recognized as an experienced Admiralty Judge. The following quotation appears on page 532 of the Opinion:

> "I hold that, under the 1936 Act, where unseaworthiness of the vessel, caused by the failure of the carrier to exercise due diligence, and negligence in the management of the ship *concur* in causing the loss, the carrier is liable for the loss." (Emphasis supplied.)

And in the case of *The Walter Raleigh (Union Carbide & Carbon Corp.* v. *SS Walter Raleigh, et al.)*, 109 F. Supp. 781, decided by Judge Leibell, the following language appears (p. 793):

> "The respondent is liable for the damage to the manganese ore caused by the overflowing oil. The carrier has the burden of showing that the loss was due to one of the excepted causes. Further, the carrier has the burden to show that it used due diligence to make the vessel seaworthy for the voyage. *American Tobacco Co.* v. *The Katingo Hadjipateras*, 1949 A. M. C. 49, 81 F. Supp. 438. If it appears that there may have been several concurring causes of the damage, the burden is on the carrier to show that it was due to one of the causes excepted under the Carriage of Goods by Sea Act. And if it is shown that more than one cause was

an effective and proximate cause of the damage and that one of the causes was the unseaworthiness of the vessel, the fact that the other cause was an excepted cause under the Act does not relieve the carrier from liability. *If unseaworthiness resulting from the carrier's failure to exercise due diligence to make the vessel seaworthy concurs with negligent management of the vessel by the officers, the carrier is liable.*" (Emphasis supplied.)

Again, in the case of *The Temple Bar*, 45 F. Supp. 608, affirmed, 137 F. 2d 293, Judge Coleman, of the District Court of Maryland, stated at page 617:

"It is true that the Carriage of Goods by Sea Act does not reduce the standards, imposed previous to that legislation, by which the seaworthiness of a vessel is to be tested, nor the requirements which constitute the exercise of due diligence. It must also be conceded that if the facts in any case disclose unseaworthiness resulting from the vessel owner's failure to exercise due diligence to make the vessel seaworthy, which concur with negligent navigation in causing the loss, the owner will be liable. *That is to say, unseaworthiness cannot be transformed into bad seamanship for the purpose of avoiding responsibility for loss of vessel or cargo. If more than one means is required to effect seaworthiness, the lack of any one of them cannot be excused. The Maria*, 1937 A. M. C. 934, 91 F. (2d) 819; *Leathem Smith-Putnam Navigation Co. v. National Union Fire Insurance Co.*, 1938 A. M. C. 842, 96 F. (2d) 923." (Emphasis supplied.)

We submit that the presence of plugs in the tank made the tank unfit for ballasting purposes and, if not the sole cause of the damage to petitioners' cargo, was a concurring cause, without which the damage would not have occurred.

In failing to apply Sections 1303(1) and 1304 as the very words of the Act indicate they should be applied, and in failing to interpret Section 1303(1) as overriding Section 1304(2)(a), the Court of Appeals, we submit, erred in affirming the decree of the District Court.

We submit the Court of Appeals erred in that it failed to consider, and to hold, that the failure of the Chief Officer, or of the Chief Engineer, to remove the plugs in the vents prior to the departure of the vessel from Brooklyn, was chargeable to respondents shipowners as a failure to exercise due diligence to make the MORMACSURF seaworthy prior to her departure from Brooklyn en route to Montreal.

That neglect of the agents or servants of the carrier is chargeable to respondents as a failure to exercise due diligence appears from the express words of Section 1304 (2)(q), which relieves the carrier from responsibility for losses arising without the actual fault of the carrier on the condition that the carrier prove, *inter alia*, that "the fault or neglect of the agents or servants of the carrier" did not contribute to the loss or damage.

Thus, in the case of *Spencer Kellogg & Sons* v. *Great Lakes Transit Corp. (The Fred Sargent)*, 32 F. Supp. 520, at page 530, Judge Tuttle stated:

> "I hold that under our 1936 Act the obligation of the carrier to exercise due diligence is not limited to his personal diligence but includes the crew of the vessel and the exercise of due diligence by the crew in the use of the equipment of the vessel before and at the beginning of the voyage."

We further submit the judgment of the Court of Appeals is in conflict with the recent opinion of the Judicial Committee of the Privy Council in the case of *Maxine Footwear Company Limited* v. *Canadian Government Merchant Ma-*

rine Limited (The Maurienne), (1959) A. C. 589, decided June 22, 1959.

The facts in the case of *The Maurienne* were that at Halifax three scupper pipes were blocked by ice at a point where they met the ship's side. The master instructed one of the officers to have these pipes thawed out. The work was done on a mid-afternoon by an employee of a Halifax firm, who used an acetylene torch. There was cork insulation around the pipes. The heat of the acetylene torch acting on the cork started a fire, which was detected at 1:30 P. M.

It was found by the learned trial judge and admitted before their Lordships that the officer who ordered and supervised the thawing was negligent. The cork insulation created a danger of fire and the man operating the torch should have been warned, or some other method used.

In spite of efforts to extinguish the fire, it spread, and at about 5:30 A. M. the following day, the master was forced to order the scuttling of the ship, which resulted in the loss, *inter alia*, of appellant's cargo.

The Judicial Committee of the Privy Council (as did Judge Tuttle in the case of *The Fred Sargent, supra*) held that (p. 602):

> "The failure to exercise due diligence by the fourth officer was therefore, if the matter becomes relevant, a failure to exercise due diligence by the carrier within Article III, Rule 1."

The language of Article III, Rule 1, of the Canadian Water Carriage of Goods Act, as we have pointed out, is identical with Section 1303, paragraph (1) of the U. S. Carriage of Goods by Sea Act.

Thus, if the failure of the Chief Officer to remove the plugs from the involved deep tank was an error in manage-

ment, as respondents contend, such failure, we submit, should be, in legal contemplation, regarded as a failure on the part of respondents owners to exercise due diligence to make the MORMACSURF seaworthy.

In the case of *The Maurienne*, *supra*, the Judicial Committee of the Privy Council held (pp. 602, 603):

> "*Article III, Rule 1, is an overriding obligation. If it is not fulfilled and the non-fulfillment causes the damage the immunities of Article IV cannot be relied on. This is the natural construction apart from the opening words of Article III, Rule 2. The fact that that Rule is made subject to the provisions of Article IV and Rule 1 is not so conditioned makes the point clear beyond argument.*" (Emphasis supplied.)

The Judicial Committee of the Privy Council in the case of *The Maurienne*, *supra*, recognized the "international currency" of the Water Carriage Acts of the various maritime countries, stating at page 603:

> "It is worth, therefore, bearing in mind words used by Lord Macmillan with reference to the English Carriage of Goods by Sea Act, 1924, which embodied the Hague Rules, as does the present act. 'It is important to remember that the Act of 1924 was the outcome of an International Conference and that the rules in the Schedule have an international currency. As these rules must come under the consideration of foreign Courts it is desirable in the interests of uniformity that their interpretation should not be rigidly controlled by domestic precedents of antecedent date, but rather that the language of the rules should be construed on broad principles of general acceptation.' (*Stag Line* v. *Foscolo Mango & Co.* [1932] A. C. 328, at p. 350.)"

After holding that Article III, Rule 1 of the Canadian Act (identical with Section 1303 paragraph (1) of the United States Act) applied "from at least the beginning of the loading until the vessel starts on her voyage," their Lordships, in the concluding remarks of their opinion (*The Maurienne*, *supra*, at pp. 603-604) stated as follows:

> "*On that view the obligation to exercise due diligence to make the ship seaworthy continued over the whole of the period from the beginning of loading until the ship sank. There was a failure to exercise due diligence during that period.* As a result the ship became unseaworthy and this unseaworthiness caused the damage to and loss of the appellants' goods. The appellants are therefore entitled to success." (Emphasis supplied.)

The immunity relating to cargo damaged by fire aboard ship, in both the Canadian and United States Acts, is identical and reads:

> "Fire, unless caused by the actual fault or privity of the carrier."

Thus, we submit, the Judicial Committee of the Privy Council, were this appeal before it, would hold that respondents-appellees, under the circumstances of these actions, would not be entitled to the benefit of Section 1304(2)(a) of the U. S. Carriage of Goods by Sea Act. The circumstance that The MAURIENNE damage was caused by fire, rather than negligent management, under the circumstance in this case, does not in any way distinguish The MAURIENNE from the instant appeal.

Indeed, the circumstance that The MAURIENNE damage was caused by fire, rather than negligent management, lends force to the argument that Section 1303(1) is an overriding obligation which, if not fulfilled, and the non-fulfillment causes the damage as a sole or a contributing cause, the immunities of Section 1304 cannot be relied on.

If the immunity with respect to "fire, unless caused by the actual fault or privity of the carrier," cannot be relied upon by the shipowner because of the negligent supervision of a fourth officer (as the Privy Council held in the case of *The Maurienne*, *supra*) which resulted in a fire, causing unseaworthiness, surely, we submit, the immunity relating to "mismanagement" should not apply in the event of unseaworthiness at the beginning of the voyage in a situation such as is involved in the instant petition where the unseaworthiness was a contributing cause of the loss.

We have urged that the instant petition for a writ of certiorari should be granted in the interests of uniformity. We have quoted on page 17 the language of the Judicial Committee of the Privy Council in the case of *The Maurienne*, *supra*, in which the Privy Council expressed the view, referring to the Canadian Water Carriage of Goods Act, identical with our Carriage of Goods by Sea Act, that as the language of the Act "must come under the consideration of foreign Courts it is desirable in the interests of uniformity" that their interpretation should not be rigidly controlled by domestic precedents of antecedent date.

This Honorable Court in its decision in the recent case of *Herd & Co., Inc.* v. *Krawill Machinery Corp.*, 359 U. S. 297, page 301, used similar language, which we quote:

> "The legislative history of the Act shows that it was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924, 51 Stat. 233. The effort of those Rules was to establish uniform ocean bills of lading to govern the rights and liabilities of carriers and shippers *inter se* in international trade."

The District Court in the case of *Zander & Co.* v. *Mississippi Shipping Co., Inc.*, *The Del Sud*, 171 F. Supp. 184, held in effect that Section 1303 of the Carriage of Goods

by Sea Act overrides Section 1304(2) of the Act, using the following language (p. 192):

> "The obligation to exercise due diligence which is imposed by Section 3 of the Act is not limited by the provisions of Section 4(2) of the Act. If any action or inaction on the part of the carrier or its agents which might otherwise be excused under Section 4(2) of the Act renders the vessel unseaworthy before or at the beginning of the voyage, there is a breach of the obligation imposed by Section 3 if the resulting unseaworthiness could have been discovered by the exercise of due diligence and was not discovered, and the carrier is responsible for the resulting damage to cargo."

On appeal (*Mississippi Shipping Co.* v. *Zander & Co.*, 270 F. 2d 345) the majority of the Court reversed the decision of the lower court, but on the ground that at the time of the involved accident causing unseaworthiness, the vessel already had departed on her voyage. In his dissenting opinion Judge Hutcheson, Circuit Judge, considered that the circumstance which made the ship unseaworthy occurred while it was still in port, and therefore, within the potential control of the shore personnel. Under such circumstances, Judge Hutcheson considered the question presented on appeal involved the question whether Section 1303 overrode, or was paramount to, Section 1304(2)(a) in the case of a vessel departing on a voyage in an unseaworthy condition.

We quote the language of Judge Hutcheson, which appears on pages 354, 355 of the report:

> "For myself, I think it clear that the case may not be decided by how many lines had or had not been cast off but only by determining which in principle is the dominating portion of the statute here, the general

> or enabling provisions of Sections 3 and 4, imposing the duty of diligence to make the ship seaworthy, that the carrier shall be bound to exercise due diligence to make the ship seaworthy 'before and at the beginning of the voyage,' that is before it leaves the port,' or the exceptive or limiting provision of Sec. 4(2)(a), that neither the carrier nor the ship shall be responsible for loss or damage arising or resulting from '(a) Act, neglect, or default of the master, mariner, pilot or the servants of the carrier in the navigation or in the management of the ship.' *In my opinion, the majority, in paramounting Section 4(2)(a), has set sail on the wrong course, while the district judge, in paramounting Section 3, has taken the right one.* Instead, therefore, as the majority seems to think of the district judge's position representing a 'highly artificial approach,' I think the shoe is on the other foot and that it is the position of the majority which is the 'highly artificial' one." (Emphasis supplied.)

The voyage of the MORMACSURF from South America to Montreal was arranged by respondents shipowners to be performed in stages. Such arrangement redounded to the benefit of respondents shipowners in that they could legally carry a dry cargo of wool stowed in No. 2 port deep tank from South America to Philadelphia. But to comply with their obligation with respect to due care and custody of the wool cargo, the six-inch overflow pipe in the tank was plugged, and the two-inch air vent pipe was capped. This was for the purpose of keeping sea water from coming in contact with the wool cargo.

Having received the benefit of receiving, carrying, and discharging dry cargo at an intermediate port, Philadelphia, the shipowners were bound, in order to meet the obligations imposed upon them by Section 1303 of the Act

with respect to cargo stowed in the compartment above the deep tank, to remove the plugs and prepare the involved deep tank so that it could be used for its primary purpose, namely, as a receptacle of water for ballasting purposes.

The plugs were not removed after discharge of the wool cargo at Philadelphia, nor at Brooklyn, nor at Boston, although at Brooklyn it was anticipated that ballasting in this tank would be necessary at Boston.

Also the arrangement of a voyage in stages benefited the owners in that the voyage could be interrupted for substantial repairs at Brooklyn by Home Office shore agents; to permit the vessel to undergo her annual Coast Guard inspection; to pay off one crew and sign on another one; and also for bunkers. Thus, we repeat, the arrangement of the voyage in stages was, for the most part, set up for the benefit of respondents shipowners.

Having so arranged matters for their benefit, the shipowners owed an obligation to cargo owners, before and at the beginning of each stage of the voyage, to exercise due diligence respecting the seaworthiness, the manning, and the fitness of the ship, and also to make all parts of the ship in which goods were carried fit and safe for their carriage and preservation. Such obligation was recognized by Courts of Appeal and District Courts under the Harter Act, 1893 (Title 46, U. S. Code, Sections 190-196), to meet the requirements of the Harter Act when a voyage was arranged for performance in stages. The same obligation is upon the carrier to meet the requirements of Section 1303(1) of the Carriage of Goods by Sea Act when a voyage is performed in stages.

It has been held that where the words in the Harter Act are similar to the words used in the Carriage of Goods by Sea Act, Congress intended that such words have the same meaning.

Thus in the case of *The Fred Sargent*, 32 F. Supp. 520, pages 529-530, Judge Tuttle observed:

> "The words 'due diligence' in Sec. 1303 and Sec. 1304(1), and the words 'in the navigation or in the management of the ship' in Sec. 1304(2)(a) are found in the Harter Act (46 U. S. C. A. §§190-195), and as used in that Act have a long judicial history in the United States. The words 'in the navigation or in the management of the ship' have been held by the British courts to have the same meaning in the British Act as in our Harter Act. Gosse, Millerd, Ltd. v. Canadian Government Merchant Marine, Ltd., supra, p. 93. *I hold that the Congress intended these words as used in the Carriage of Goods by Sea Act 1936, to have the same meaning as that assigned to them in the long line of decisions construing these words as used in the Harter Act.*" (Emphasis supplied.)

In the case of *The Steel Navigator*, 23 F. 2d 590, the Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, observed with reference to a voyage in stages (p. 592):

> "Hence has arisen in England the doctrine of a voyage in stages, marked by ports of call. This, as we understand it, means no more than that, when the demands upon her change as the voyage proceeds, she satisfies her covenant if she is fit at any port for that leg of the voyage immediately following. Quebec Ins. Co. v. Com. Bk. of Canada, L. R. 3 P. C. 234; Dixon v. Sadler, 5 Mees. & W. 405 (Ex. Ch.). The doctrine has been chiefly applied in the case of bunker coal. Thin v. Richards, L. R. [1892] 2 Q. B. 141; The Vortigern, L. R. [1899] Pro. D. 140. Recently it has been recognized in this country. The Willdomino, 300 F. 5 (C.C.A. 3)."

And thus in the case of *The Glymont* (*U. S. of America v. American Trading Co.*), 2 Cir., 66 F. 2d 617, Judge Swan stated, at page 619:

> "If a vessel is to have the benefit of the doctrine of voyage by stages, her duty to be seaworthy at the beginning of each stage should be as great as though the voyage were single. Whether the lack of diligence to take adequate bunkers were that of the master or of the owner's shore agents would make no difference if the voyage were single. See *International Nav. Co. v. Farr & Bailey*, 181 U. S. 218, 225. The rule should be the same when the voyage is by stages."

And thus in the case of *The Willdomino*, 300 Fed. 5 (3rd Cir.) (affirmed by the U. S. Supreme Court on other grounds, 272 U. S. 718), the Court stated (pp. 11, 12):

> "The voyage from Messina to New York was either an unbroken voyage or it was a voyage divided into stages. If the former assumption is the correct one due diligence must have been exercised to have had on board the vessel at the beginning of the voyage a supply of fuel adequate and proper to complete the whole voyage. If, however, the second assumption is the correct one *like diligence must have been exercised to have had on board at the beginning of each stage of the voyage a supply of fuel adequate and proper to complete the stage of the voyage entered upon.*" (Emphasis supplied.)

Obviously if the mere putting into ports between the initial port of departure and the final port of discharge, for bunkers is, in legal contemplation, regarded as a voyage in stages, a voyage arranged by the owner for putting into intermediate ports for purposes mentioned herein, including repairs, *and including bunkers*, is, we submit, most certainly a voyage as to which the owners must be bound

by the provisions of Section 1303(1). In so far as petitioners are concerned, we submit, the respondents shipowners were bound by Section 1303(1) at and prior to the departure of the vessel from Brooklyn to carry out their obligations under Section 1303(1) to the same extent and manner as they were bound prior to the departure of the vessel from South America.

* * * * * *

The Court of Appeals in its opinion (276 F. 2d 722, p. 723), stated that

> "If the facts warrant the conclusion that there was fault 'in the management of the ship' the law relieves the carrier and the ship from responsibility (46 U. S. C. A. section 1304(2)(a)."

The above quoted statement, we submit, gives an interpretation to Section 1304(2)(a) as independent of, and overriding, and paramount to Section 1303(1). In doing so, we submit, the Court of Appeals committed a grave error which will be seized upon by vessel interests for relief of liability irrespective of seaworthiness or unseaworthiness. We submit, as said in the case of *The Temple Bar*, 45 F. Supp. 698, affirmed 137 F. 2d 293, at page 617:

> *"Unseaworthiness cannot be transformed into bad seamanship for the purpose of avoiding responsibility for loss of vessel or of cargo."*

The Court of Appeals in the case of *The Elkton*, 49 F. 2d 700, at page 701, speaking through Judge Learned Hand, used language to the same effect, thusly:

> "It makes no difference whether the defect is in shell or hull; with her whole management the owner is charged unless he does his part. In the case at bar it is therefore immaterial whether the engineer knew that

he should not fill the tank. *If he did, his forgetfulness, or supposition that the oil would not reach the sugar, was a fault, in management it is true, but in the management of a ship which required more care than the owner could exact at the shipper's peril.*" (Emphasis supplied.)

We submit, the statement of the Court of Appeals would have the effect of transforming unseaworthiness into bad seamanship for the purpose of avoiding responsibility for loss of vessel or of cargo.

2.

Cargo Care and Custody versus Error in Management Section 1303(2) v. 1304

Section 1303(2) of the Carriage of Goods by Sea Act provides:

> "The carrier shall properly and carefully load, handle, stow, carry, keep, care for and discharge the goods carried."

Thus the very language of Section 1303(2) makes it apply throughout the period from the beginning of loading until the goods have been discharged, and irrespective of the condition of the vessel. Be a ship never so seaworthy, if goods are damaged by reason of the lack of care in the custody of the cargo, the carrier is liable for the resulting damage.

The Court of Appeals in its Opinion, 276 F. 2d 722, page 724, recognized that "The choice between improper care

and management is often difficult." Following such observation, the Court of Appeals continued (p. 724):

> "However, looking to the primary purpose of the ballasting operation, it was clearly for the welfare of the entire ship *without regard to care of any particular cargo or even cargo as a whole*. The negligent pumping in trimming the ship was management intimately connected with her navigation." (Emphasis supplied.)

We agree that under the circumstances set forth in this petition the ballasting operation was conducted "without regard to care of any particular cargo or even cargo as a whole." But, we submit that even the ballasting operation must be conducted "with regard to care of any particular cargo and of cargo as a whole." We submit the Court of Appeals erred in such respect, notwithstanding ballasting falls within the category of "management" within the meaning of Section 1304(2)(a), for reasons which follow.

The District Court found that:

> "The plug and cap were still in the overflow and vent pipes, respectively, when the No. 2 port deep tank cover was closed and the hatch boards put on at New York (Brooklyn) on July 10, 1954, *and the Chief officer knew it.*" (Opinion of Edelstein, D.J., 290a; Finding of Fact No. 9.)

District Judge Edelstein also found (Opinion, 291a, folio 1019) that:

> "An ullage of 26 feet in No. 2 port deep tank means that there was three feet of empty space between the surface of the liquid in No. 2 port deep tank and the top of the tank. The Chief Officer misread the ullage tape, for the No. 2 port deep tank was then full and the correct ullage was 26 feet. Thereafter, at 6:10 A.M. the chief officer ordered the engineers to start

transferring ballast from one of the No. 4 deep tanks to No. 2 port deep tank. He knew that the overflow pipe plug was in and the vent pipe was capped and he did not intend to press up or fill the tank."

As a result of transferring the ballast by the use of the powerful cargo pump, pressure built up within the tank, causing the tank cover to bulge and the water to overflow into the compartment above the tank where libellants' cargo was stowed.

At the trial the Chief Officer, *on direct examination*, testified (Appendix to Appellants' Brief, p. 130a):

"Q. Mr. DeMontier, based on the facts as you observed them at the time, what was the cause of the water getting into this No. 2 port deep tank? A. Well, I allowed an excess of head pressure to be put in the tank.

Q. And how did that happen? A. Oh, it happened for two reasons: I left the plugs in. I believe I falsely read or mistakenly read the ullage tape the morning before I started to transfer the ballast. That is the only reason I can see.

Q. You mean you now say that that 29-foot ullage was a mistake in reading. A. It must have been."

We submit that the Chief Officer, knowing that the plugs had been left in, and allowing "an excess of head pressure to be put in the tank," and charged with the knowledge that an excess of head pressure would, or might, unseat the tank cover permitting the tank to overflow into the compartment above the tank, *and indeed using the tank against the advices of the Chief Engineer, who had charge of the fitness of the tank*, was guilty of gross negligence with respect to the care and custody of the petitioners' cargo.

Conceding that the Chief Officer erred with respect to "management," nevertheless, we submit that the Chief Officer conducted the ballasting operation with utter disregard of the likelihood of damage to petitioners' cargo. The ullage was taken as a protection against the overflowing of the tank. *Neglect to remove the plugs created an unfit condition favorable to the overflowing of the tank into the compartment above it. A combination of "management" and of lack of care in the custody of the cargo, concurrently causing damage to petitioners' cargo, should make, we submit, the respondents shipowners liable for the cargo damage.*

The circumstances of this action are very similar to the circumstances which appear in the case of *The Elkton* (*Compania General de Tabacos de Filipinas* v. *United States of America*), 49 F. 2d 700.

In the case of The Elkton, supra, sugar was shipped at Manila for discharge at Baltimore. The vessel made intermediate stops at Shanghai and Honolulu. The sugar was stowed in a compartment over a tank top. At the time the sugar was stowed, the tank was empty. At Shanghai the tank was examined by a surveyor who reported the "tank should be kept empty or slack." However, at Honolulu, the engineer of the vessel "for some unknown reason gave orders to fill it," with the result that oil flowed through a vent pipe and damaged the cargo.

The defense was that the ship was in all respects seaworthy when she left Manila except for the defective tank; that the master at any rate knew of the injury; and that if he did not tell the chief engineer, or if the engineer was negligent in giving the order to fill the tank at Honolulu, it was an error of management for which the owner was not liable under Section 3 of the Harter Act (46 U. S. C. A. Section 192).

Recognizing that there was a fault in the "management" of the ship, nevertheless, the Court of Appeals for the Second Circuit, speaking through Judge Learned Hand, *held that the fault was in the management of a ship which required more care than the owner could exact at the shipper's peril.* We quote, rather at length, from the opinion in *The Elkton*, 49 F. 2d 700, at page 701, in view of the similarity of the facts involved in the instant petition, and the facts involved in the case of *The Elkton*:

> "The case at bar is an effort to extend this doctrine to a case where the ship is not sound in hull, on the ground that her fault was known. It is argued that the error is still only one of management, provided of course that, if properly handled, she can be made to serve her purposes.
>
> The gloss thus put forward—without the support of any authority—would extend the doctrine to cases where a crippled ship is turned over to a crew with instructions so to use her as to avoid the consequences. She will be seaworthy if the crew prove duly attentive. For instance, if the rudder be bent, the quartermaster may be instructed to make proper allowance in his helm; if the boilers be weak, the engineer, to keep a low head of steam. We should scarcely suppose that the argument would be pressed to defects which affected the ship's ability to withstand wind and sea, and indeed it is not necessary here to go so far, unless we regard the tank top as part of the shell. There is some evidence to that effect, but we may disregard it, because the same considerations control the seaworthiness of her holds as of her bottom. *These were suitable for sugar only if the tank was not filled, that is, in the event that the engine-room took care not to use the ship for her normal purposes.*

Section three of the Harter Act (46 USCA §192) gives a privilege to the owner, an immunity dependent upon the condition that he use due diligence to make his ship 'in all respects' seaworthy, within as well as without. When he does, he is excused from what would otherwise be a breach of his contract, a liability in tort, if one choose, in any event a wrong under the maritime law. By hypothesis he stands at fault but for his compliance with the statute, which then imposes upon the shipper the risk of those lapses in duty of the owner's servants for which he is ordinarily responsible. When the owner accepts cargo in an unseaworthy ship, though the defect be such as may be neutralized by care, he imposes on the shipper an added risk; not merely that his servants may fail, in so far as she is sound and fit, but that they may neglect those added precautions which her condition demands. That risk the statute does not impose upon the shipper; he bears no loss until the owner has done his best to remove all risks except those inevitable upon the seas. *It makes no difference whether the defect is in shell or hold; with her whole management the owner is charged unless he does his part. In the case at bar it is therefore immaterial whether the engineer knew that he should not fill the tank. If he did, his forgetfulness, or supposition that the oil would not reach the sugar, was a fault, in management it is true, but in the management of a ship which required more care than the owner could exact at the shipper's peril.*" (Emphasis supplied.)

The District Court (Opinion, Appendix to Appellants' Brief, p. 295a, folio 1023) made the following statement:

"To say, as the libelants do, that negligence in ballasting amounts to negligence in the care and custody

of cargo is to say no more than that negligent ballasting may well result in damage to cargo."

The Court of Appeals quoted the same language (276 F. 2d 722, pp. 723, 724).

Petitioners *did not argue*, either before the District Court or before the Court of Appeals, "that negligence in ballasting amounts to negligence in the care and custody of cargo." Petitioners *did argue* that negligent ballasting of an unfit tank (unfit because vent plugs had not been removed from the tank) by means of a powerful cargo pump, which, admittedly, created an internal pressure causing the tank cover to become unseated, and causing water to overflow into the cargo compartment above the tank, related, at least as a contributing cause, to the care and custody of cargo.

Both the District Court and the Court of Appeals wholly disregarded the decision of the Court of Appeals in the case of *The Elkton, supra*, which, we submit, should have been considered in the determination of the action. Instead of so doing, both the District Court and the Court of Appeals, in determining that ballasting was "management," without regard "to care of any particular cargo or even cargo as a whole," based its decision on *Leon Bernstein Company* v. *Wilhelmsen*, 232 F. 2d 771.

We submit the last cited case is clearly distinguishable from the instant action. True, the cargo damage in the *Bernstein* case, *supra*, occurred by reason of the overflowing of deep tanks through an open manhole in the top of the deep tank located in the same hold in which the cargo was stowed. The tanks involved in the *Bernstein* case had been empty, when in anticipation of heavy weather during the typhoon season, nearing Hong Kong, it was decided to fill the empty deep tanks with sea water ballast for better

trim. The manhole cover had been removed to enable the Mate to determine when the tank was filled. Concededly, the Mate was negligent in not having closed down the intake before the tank overflowed. *The distinction between the Bernstein case and the instant action is that the tank involved in the Bernstein case was in fit condition to receive ballast. The overflow pipe and vent pipe were not plugged or capped as in the instant action. The tank did not overflow as the result of internal pressure created by a condition which made the tank unfit to receive ballast, as in the instant action.*

We submit in the instant case this petition should be governed, not by the decision in the *Bernstein* case, but by the decision of the Court of Appeals in the case of *The Elkton, supra.*

On the authority of *The Elkton, supra*, a carrier may be held liable notwithstanding negligent ballasting falling within the meaning of the term "management," as used in Section 1304(2)(a) of the Act, *if such mismanagement is associated with "unseaworthiness" or with care and custody of cargo.*

That respondents shipowners recognized that ballasting under the circumstances involved herein might relate to care and custody of cargo appears from evidence introduced at the trial (Libellants' Exhibit B, p. 27-a).

A reading of the last mentioned exhibit will disclose that respondents shipowners, even prior to the involved cargo loss, recognized that damage might result to cargo stowed in the spaces above the deep tanks when ballasting deep tanks with water, if the tank were unfit, or the officers careless in permitting the build up of pressure within the tank. Such recognition of possible cargo damage becomes evident upon the reading of a directive issued by respondents ship-

owners to the Masters, Chief Officers and Chief Engineers of "All Cargo Vessels" owned by respondents shipowners, captioned "Ballasting of Deep Tanks" (Libellants' Exhibit 13, p. 278a).

The reason given by respondents for the directive regarding the ballasting of deep tanks appears in the first paragraph of the directive, and reads as follows:

> "There have been several occasions recently where ballasting of deep tanks with water has resulted in damage to cargo in the spaces above; these generally have been the result of carelessness and further such instances will not be tolerated."

The directive contains eight general instructions to be carried out in the future.

We quote certain of these instructions, as follows:

> "(2) When time permits ballasting will be done with fire hose."
>
> "(3) When time does not permit ballasting may be done through the ballast lines but only after definite orders by the Master; the Chief Officer will be responsible for ensuring that a head is not put on the tanks."
>
> "(6) Tanks must not be allowed to overflow through the vents as a sign that they are filled; the state of fullness must be determined by careful sounding; overflowing indicates excessive head."
>
> "(7) Tanks must never be pressed up when there is cargo stowed in the compartments over same."

We submit the above mentioned directive, regarding ballasting of deep tanks, is, by implication, tantamount to an

admission on the part of respondents shipowners that if the vents were plugged when the deep tanks were used for water ballast, such tanks, being plugged, would then become unfit for water ballast, and create a hazard to cargo stowed above the tank. It would not be possible to press up the tanks, by creating infernal pressure, to the poundage required to unseat the tank cover, unless both the overflow pipe, and the air vent, were at such time plugged and capped.

The decision of this Honorable Court, speaking through Mr. Justice Holmes, in the case of *The Germanic*, 196 U. S. 589, we submit, supports the argument of petitioners that the involved cargo damage occurred as a result of "unseaworthiness," or as the result of "lack of care and custody" within the meaning of Section 1303 of the Act. Briefly, the facts in *The Germanic* were that the involved vessel arrived in New York thirty-six hours late, and in order to sail at her regular time, began to discharge cargo from all of her five hatches at once. At the same time she was taking in coal from coal barges on both sides. She suddenly listed from starboard to port. As she rolled over, the open cover of a coal port was knocked off, leaving the bottom of the coal port about a foot above the water line. Thereupon the master ordered that coaling should be stopped on the port side, but continued on the starboard side, and that no more cargo should be taken from the lower hold. The master further ordered that some sugar in bags should be shifted to the starboard side. As a result, the steamer rolled back to starboard, and coaling was resumed on the port side, but was stopped on the starboard side. Later the steamer suddenly rolled over again to the port side, carrying the lower part of the open coal port below the water line. As a result the ship sank, causing damage to the involved goods.

Under the facts stated in the preceding paragraph, this Honorable Court held that the cargo loss resulted not from

"management of the vessel," but from lack of care with respect to cargo. *The Court observed that the shifting of the cargo on board the vessel to counteract her different lists, and the shifting of coal bunkers, did not involve "management"; that the primary purpose for the haste discharge was to get the cargo promptly ashore. So holding, this Honorable Court found in favor of the owners of the cargo.*

We submit that the negligent actions of the Chief Officer in permitting the vents of the deep tank in the MORMACSURF to remain plugged, and in his "reconstructed" error in taking an ullage, and in his using the powerful cargo pump to transfer water to this tank, which was already filled, or nearly filled, thereby creating an internal pressure which unseated the tank cover and permitted water to flow into the compartment in which petitioners' cargo was stowed, all related to the care and custody of the involved cargo, to a greater degree, we submit, than did the shifting of cargo and bunkers in the case of *The Germanic*.

3.

Title

In its answer to the libel of General Foods Corporation, and to the libel of H. L. McKinnon Co., Ltd., respondent raised the question whether libellants held title to the involved coffee sufficient to maintain the actions.

As to the General Foods Corporation, it was stipulated by and between the respective proctors that libellant was at all material times owner and holder of the bill of lading covering the involved shipment of coffee (Libellants' Exhibit 11, Appendix to Appellants' Brief, p. 27a).

As to H. L. McKinnon Co., Ltd., libellant was put to its proof. The question of title in the McKinnon action was not

decided either in the District Court, or by the Court of Appeals. The proof was that McKinnon was named in the covering bill of lading as the party to be notified. Testimony was introduced at the trial, which was undisputed, that H. L. McKinnon Co., Ltd. was the sole owner of the coffee involved in the action of McKinnon.

CONCLUSION

It is respectfully submitted that this case is an appropriate one for exercise of this Court's certiorari jurisdiction.

HORACE T. ATKINS
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New York 5, N. Y.

APPENDIX

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 114 and 115—October Term, 1959.

(Argued February 9, 1960 Decided April 6, 1960.)

Docket Nos. 25798 and 25799

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Libelant-Appellant,

—v.—

SS MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondent-Appellee.

H. L. McKINNON CO., LTD.,

Libelant-Appellant,

—v.—

SS MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondent-Appellee.

Before:

MOORE, *Circuit Judge*, and
SMITH and HERLANDS, *District Judges*.

Appeal from decrees of the United States District Court for the Southern District of New York, Edelstein, *D.J.* (decision unreported), dismissing libels which sought recovery for damage to a shipment of coffee. The damage was found to have been caused by an error in management or navigation and hence respondents were not liable. 46 U. S. C. A. section 1304(2)(a).

Affirmed

HORACE T. ATKINS, New York, N. Y. (Atkins & Weymar, New York, N. Y., on the brief), *for Libelants-Appellants.*

EUGENE UNDERWOOD, New York, N. Y. (Burlingham, Hupper & Kennedy, Herbert M. Lord, New York, N. Y., on the brief), *for Respondent-Appellee.*

PER CURIAM:

Libelants, General Foods Corporation, Maxwell House Division and H. L. McKinnon Co., Ltd., respectively, appeal from decrees dismissing after trial libels against respondents Moore-McCormack Lines, Inc. and S.S. Mormacsurf. The subject matter of the suits was coffee shipped from South America destined for Montreal. The damage was caused by water entering the 'tweendeck area where the coffee was stowed. The bills of lading incorporated the Carriage of Goods by Sea Act (46 U. S. C. A. sections 1300 *et seq.*). All parties are in substantial agreement that the principal question is whether the damage resulted from unseaworthiness, lack of care of the cargo or from negligent management of the ship. If the facts warrant the conclusion that there was fault "in the management of the ship" the law relieves the carrier and the ship from

responsibility (46 U. S. C. A. section 1304(2)(c)(q)). If unseaworthiness or lack of care be found the libelants should prevail. Naturally from substantial agreement as to the controlling question the parties change to substantial disagreement as to the cause.

Libelants' unseaworthiness argument rests upon certain repairs to be made during a stop-over in Brooklyn, i.e., the installation of three swing bolts to the No. 2 deep tank cover the tank which eventually overflowed causing the damage. The trial court after hearing the witnesses and carefully analyzing the facts found that the repairs had been made and that the "MORMACSTAR was at all times seaworthy." This finding, adequately supported by the evidence, renders academic libelants' contention that the voyage should have been regarded "as a voyage in stages" because so repaired the ship was seaworthy from Brooklyn on to Montreal.

At Boston the necessity to put the ship in proper ballast for its voyage to Montreal required the No. 2 deep tank to be filled with water. Appropriate orders were given but, as the trial court found, due to an erroneous reading of an ullage* tape a ship's officer miscalculated the amount of unfilled area in the tank. As a result the pumping of ballast water continued, causing the tank cover to bulge under pressure thus permitting water to flood the coffee stowage area. Is this fault negligent care of cargo or negligent mismanagement of the ship? This is the narrow battleground of factual and legal dispute which the parties have significantly named "The Battle of The Bulge."

Damage to the cargo alone does not establish liability because as the trial court properly pointed out "To say, as the libellants do, that negligence in ballasting amounts to negligence in the care and custody of cargo is to say no

* Ullage—the amount which the tank lacked of being full

more than that negligent ballasting may well result in damage to cargo." The choice between improper care and management is often difficult. However, looking to the primary purpose of the ballasting operation, it was clearly for the welfare of the entire ship without regard to care of any particular cargo or even cargo as a whole. The negligent pumping in trimming the ship was management intimately connected with her navigation.

The trial court's conclusion that the damage resulted from an error "in the management of the vessel within the meaning of the United States Carriage of Goods by Sea Act, Title 46 U. S. Code, Sec. 1304(2)(a)," thus relieving respondents of liability must be affirmed (*Leon Bernstein Company* v. *Wilhelmsen*, 5 Cir., 1956, 232 F. 2d 771; *The Steel Navigator*, 2 Cir., 1928, 23 F. 2d 590).

Decrees dismissing the libels affirmed.

Judgments

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixth day of April one thousand nine hundred and sixty.

Present:

HON. LEONARD P. MOORE,
Circuit Judge.

HON. J. JOSEPH SMITH,
HON. WILLIAM B. HERLANDS,
District Judges.

GENERAL FOODS CORPORATION, MAXWELL HOUSE DIVISION,

Libelant-Appellant,

—v.—

88 MORMACSURF, her engines, boilers, etc., and MOORE-McCORMACK LINES, INC.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court-house in the City of New York, on the sixth day of April one thousand nine hundred and sixty.

Present:

HON. LEONARD P. MOORE,
Circuit Judge.

HON. J. JOSEPH SMITH,
District Judge.

HON. WILLIAM B. HERLANDS,
District Judge.

H. L. McKINNON CO., LTD.,

Libelant-Appellant,

—v.—

MOORE-McCORMACK LINES, INC. and S.S. MORMACSURF,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the decree of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSARO
Clerk